

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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NEW FEDERAL PUBLIC DEFENDER OFFICE AND ADDRESS

After 18 months operating from the basement of the federal courthouse in Clarksburg, the Federal Public Defender Office recently moved to permanent space at:

Office of the Federal Public Defender
The Huntington Bank Building
230 West Pike Street, Suite 360
Clarksburg, West Virginia 26302
Telephone No. (304) 623-3823
Facsimile No. (304) 622-463

Please forward all correspondence, including CJA vouchers, to the above-listed mailing address and discontinue use of our old P.O. Box address.

This additional space allowed us to set up a well-stocked criminal law library and free computer assisted legal research (Westlaw) is available to any CJA Panel attorney defending an appointed case. Stop by to see the new place if you have a chance.

BLAKELY V. WASHINGTON AND ITS LOGICAL EXTENSION TO THE FEDERAL SENTENCING GUIDELINES

Recently, the Supreme Court issued an opinion that may drastically change federal criminal practice. The case is Blakely v. Washington, 2004 WL 1402697

(June 24, 2004). Although the case dealt with the sentencing scheme used by the State of Washington, the Court expressly extended the reasoning of Apprendi to all facts that require an increased sentence in any manner. According to the Court, the relevant "statutory maximum" for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in a jury verdict or admitted by the defendant at a guilty plea hearing. Factors that can increase a defendant's sentence must now be included in the charging document and proven by a jury beyond a reasonable doubt at trial unless defendant admits to such facts at a plea hearing. Many of the Justices note that the Federal Sentencing Guidelines, similar to the Washington's sentencing scheme, may be subject to the same attack.

An extension of Blakely to sentencing under the Federal Sentencing Guidelines will necessitate major changes. All Chapter 2, 3 and 5 enhancements previously decided by the court at a sentencing hearing by a preponderance of the evidence standard may now need to be presented to a grand jury, included in the indictment, and proven by a jury at trial beyond a reasonable doubt, unless expressly admitted to by a defendant at a Rule 11 guilty plea hearing. This can include drug quantities used as relevant conduct.

The Blakely decision has thrown federal sentencing practices into confusion. In a case from Utah, United States v. Brent Crawford, the district court found the

Federal Sentencing Guidelines were unconstitutional and the court imposed a sentence using only the statutory factors found under 18 U.S.C. Sec. 3553. The sentence imposed was only 3-months shy of the low-end 151-month sentence defendant faced under the guidelines. In a case from the Southern District of West Virginia, the court in United States v. Ronald Shamblin, corrected defendant's 240 month sentence for conspiracy to distribute methamphetamine, and re-sentenced based on only those facts admitted by defendant at his earlier guilty plea. Because no drug weights were admitted to by defendant at the plea hearing, the court reduced the sentence to 12-months in prison.

Included as an attachment to this edition of the *Quarterly* you will find a Department of Justice memorandum issued July 2, 2004. It offers all federal prosecutors the Department's legal position and policies in light of Blakely. Please read the memorandum and expect its implementation in your pending federal criminal cases. While DOJ claims Blakely does not apply to the Federal Sentencing Guidelines, it asks that federal prosecutors tailor charging practices. Indictments must include all provable guideline enhancements, and plea agreements should include Blakely waivers.

There are no easy answers given the uncertainty generated by Blakely. Defense attorneys should assume that all constitutional protections outlined in Blakely will apply in a federal criminal case. And, the unique procedural posture of a pending criminal case must be now considered. How does Blakely apply to a defendant who already executed a plea agreement and is awaiting sentencing, or a

defendant who went to trial and is awaiting sentencing after a jury made only limited findings by a general verdict? Is supplemental briefing required/allowed in cases pending on direct appeal? And finally, will the Blakely protections be deemed "such a watershed rule of criminal procedure that alters bedrock principles and seriously enhances the accuracy of proceedings," such that it should apply retroactively for purposes of collateral review? On July 9, 2004, the 11th Circuit held in In Re: Dean that Blakely cannot apply retroactively until the Supreme Court expressly orders such application.

This Defender Office will maintain a hard-copy and electronic file of all pleadings it prepares or that were prepared by other Defender Offices, as well as court opinions that issue, extending the Blakely protections to federal criminal cases. Please call (304) 622-3823 if you have any questions relating to Blakely or wish to access these files.

EARLY RELEASE ELIGIBILITY UNDER THE BOP'S INTENSIVE DRUG TREATMENT PROGRAM AND THE BOOT CAMP PROGRAM

Many federal criminal defendants request information on the Bureau of Prison's 500-hour drug treatment program which includes, as a completion incentive, up to a 12-month reduction to a federal sentence. Most defendants can participate in the program if they have a documented substance abuse problem and received a sufficient sentence within which to complete the program. However, not every defendant is eligible for early release. The early release criteria may be found in Chapter 6 of the Inmate Drug Abuse Program Manual under "FOIA/Publications" on the BOP's

website at www.bop.gov

A federal inmate is not eligible for early release upon completion of the intensive drug treatment program if any of the following factors are found by the BOP: 1) is an INS detainee; 2) is a pre-trial inmate; 3) is serving as a contractual boarder from another state, D.C., or a military system; 4) the inmate has a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, aggravated assault, or child sexual abuse [use the PRS to screen your client's eligibility]; 5) the current offense is a crime of violence [BOP uses a very broad interpretation of this term], it involved use/possession of a firearm [such as a 2D1.1(b)(1) enhancement or a 922(g) conviction], or 6) the current offense involved a sexual abuse offense upon children.

The BOP's eligibility criteria for participation in the Boot Camp Program is slightly different, and a successful completion of that program will result in a lesser sentence and immediate placement to a half-way house or home confinement setting. See the Intensive Confinement Center Program policy statement under the same section of the BOP's website. An inmate must be 1) serving a sentence of more than 12 months but less than 30, or serving a sentence of more than 30 months, but less than 60 months, and is within 24 months of projected release; 2) serving the first period of incarceration or has a minor history of prior incarceration; 3) is not serving a term of imprisonment for a crime of violence or felony offense the involving use/possession of a firearm or the sexual abuse of children; 4) is appropriate for housing at a minimum security facility; and 6) is physically and mentally capable of

participating in the program.

Finally, the BOP will consider a defendant for direct placement into the Boot Camp Program if recommended by the district court judge at sentencing. If the recommendation is ultimately approved by BOP, a defendant could remain on bond until the next Boot Camp cycle opens. Further information on this procedure is available by contacting the Mid-Atlantic Regional Office of the BOP. While more Boot Camp Programs may open, at present males must attend the program in Pennsylvania, and women must to go a federal facility in Texas.

NEW ALTERNATIVE TO PRE-TRIAL DETENTION

We constantly hear from our clients how difficult it is to serve pre-trial detention in West Virginia's regional jails. Overcrowding, poor medical care, low quality food, and lack of access to the outdoors (and tobacco?!) are some of the typical complaints.

Recently, the United States Probation Office for this district made arrangements with the BOP so that pre-trial defendants can be housed at the Bannum Place of Clarksburg, a half-way house. This structured setting provides 24 hour supervision and accountability, access to substance abuse counseling and the opportunity for full-time employment. Typically, Bannum Place requires 25% of a resident's wages for room and board.

A request for pre-trial participation at Bannum Place must be made to the Court at the detention hearing. Any pre-trial participant must have a TB test and physical

prior to placement. Time served on pre-trial status at the half-way house is not creditable towards a later federal sentence.

For more information, call United States Probation Officer Jeff Givens at (304) 624-5504.

FOURTH CIRCUIT ROUND-UP

United States v. Johnson, 93 Fed. Appx. 582 (4th Cir. 2004)(unpublished).

- Non-vehicular fleeing from an officer, under West Virginia Code Sec. 61-5-17, should not count toward criminal history under U.S.S.G. Sec. 4A1.2 because the offense is “similar” to the listed offense of hindering or failing to obey the a police officer.

United States v. Hsu, 364 F.3d 192 (4th Cir. 2004).

- Detailed analysis of defense showing required for entrapment instruction.
- Defendant must show both lack of predisposition, and government inducement which must include solicitation plus some overreaching or improper conduct.

United States v. Hatfield, 365 F.3d 332 (4th Cir. 2004).

- Requirement that police knock and announce their presence before forcible home entry does not apply when occupant responds “come in” to officers who simply knocked on door.

United States v. Tigney, 367 F.3d 200 (4th Cir. 2004).

- Both local ordinance and West Virginia misdemeanor for failure to appear in state court do not count toward criminal history under U.S.S.G. Sec. 4A1.2 because offense is “similar” to listed offense of contempt of court [Congratulations to Martinsburg CJA Panel Attorney Barry Beck for his victory].

United States v. Riggs, 370 F.3d 382 (4th Cir. 2004).

- Court overturns district court’s downward departure based on diminished capacity by using *de novo* standard of review.
- Court finds that 922(g) defendant with prior convictions for drug distribution and possession of short-barrel shotgun, who suffered from paranoid schizophrenia unless medicated, was not eligible for departure because “the facts and circumstances of the defendant’s offense indicate a need to protect the public.”
- Court finds defendant can discontinue taking medications, and had done so in past, such that a need to protect the public existed.

United States v. Cross, 371 F.3d 176 (4th Cir. 2004).

- For defendant convicted of using force to intimidate a federal witness in a drug case, U.S.S.G. Sec. 2X3.1 requires sentencing court to use base offense level for the drug-related “underlying offense,” including any increase based on the quantity of the drugs involved, without regard to whether defendant knew or had reason to know of the drug amount involved.